IN AND BEFORE THE

FEDERAL ELECTION COMMISSION

Décor Services, LLC, Respondent MUR 7019

RESPONSE TO MUR 7019;
MOTION TO DISMISS COMPLAINT

Décor Services LLC ("Décor Services"), files this Response to the complaint filed with the Federal Election Commission ("Commission") by the Campaign Legal Center, Democracy 21, and Paul S. Ryan ("Complainants") in Matter Under Review 7019 ("MUR 7019"), ("the Complaint").

The Complaint falsely alleges that Décor Services LLC has committed a violation of the Federal Election Campaigns Act, Title 52 United States Code, Subtitle III, Chapter 301, Subchapter I, ("the Act") and the FEC's regulations by making a legally permissible contribution to an Independent Expenditures Only Committee ("SuperPAC").

Respondent submits that the Complaint does not constitute a violation of the Act or the Commission's regulations and, accordingly, the Complaint must be dismissed.

FACTS OF THE COMPLAINT

1. The Complaint alleges that Décor Services made an illegal contribution to America Leads, a SuperPAC registered with the FEC.

2. America Leads reported on its February 2016 Monthly FEC Report that Décor Services contributed $250,000 to the Committee on January 28, 2016. *See* p.9C, America Leads February 2016 Monthly FEC Report. http://docquery.fec.gov/cgi-bin/fecimg?_20160219900850617 1+0

3. On its February 2016 Monthly FEC Report, America Leads reported a total of twenty-five (25) itemized contributions, including:

    - Six (6) contributions from LLC's (one of which was the contribution from Décor Services)
    - Two (2) contributions from corporations
    - One (1) contribution from an LLP
    - One (1) contribution from a business entity whose form is unknown

4. In other words, forty percent (40%) of the contributions reported by America Leads on its February 2016 Monthly FEC Report were from corporate or business sources and entities other than individuals, *none* of whose 'underlying donors' were identified or disclosed. That is because there is no legal requirement that such information be reported.

5. The contributions to America Leads from LLCs, partnerships, corporations and other business entities identify the donors as the party whose name appears on the bank account from which the funds are drawn, exactly as is required by law.

6. In the period during which America Leads has been in existence, there have been multiple filings, entries and reports filed with the Commission, yet not a *single* Request for Additional Information ("RFAI") from the FEC's Reports Analysis Division has been directed at America Leads inquiring about the 'source' of funds for any contribution reported by the committee from an LLC, LLP, corporation or other business entity. *See* Reports Index for America Leads, C00573055 http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do

7. The Complaint alleges that because Décor Services was established shortly before the contribution date, then the contribution is not allowed, despite the fact that no legal authority exists requiring an entity to be in existence for any particular time period before being eligible to make a contribution to a SuperPAC. *See* Complaint, ¶5.

8. The allegations in the Complaint about the contribution from Décor Services could be made about *every* contribution to *every* SuperPAC from any LLC, LLP, corporation, partnership or other business entity. Yet, Complainants have not filed complaints against any of the *other* LLCs that are reported to have given contributions to America Leads during the same time period as the contribution from Décor Services.

Legal Argument and Analysis

There is no legal issue arising from the contribution from Décor Services to America Leads. Accordingly, the Complaint must be dismissed.

A. *Independent Expenditures Only Committees are allowed to receive contributions from LLCs, partnerships and corporations.*

All the regulations cited by the Complaint as the basis for the claimed violations are inapplicable to SuperPACs. The regulations relied upon by the Complainants were promulgated prior to the Supreme Court's decision in *Citizens United v FEC*, 558 U.S. 310 (2010) and *SpeechNow.org v. FEC*, 599 F. 3d 686 (D.C. Cir. 2010), the two judicial decisions that gave rise to SuperPACs. The regulations at issue apply to political committees that are not *allowed* to receive contributions from corporations, may accept only certain LLC contributions and must

allocate a partnership contribution in such a manner as to clearly provide that the contribution is from a specific individual[1]. None of those premises or procedures are present when a corporation, partnership or LLC makes a contribution to a SuperPAC. Thus, the regulations relied upon in the Complaint are inapplicable and nonsensical in this context, where the contribution is given to a SuperPAC, one which is permitted to accept such contributions.

If the Commission has some notion that these types of contributions to SuperPACs should be subject to some new method of review and reporting, that has never been communicated to the public. The Commission has had more than six years to promulgate new regulations that distinguish the treatment of *prohibited* contributions from LLCs and corporations when made to 'hard dollar' committees (*i.e.*, candidate committees, national party committees or PACs that contribute to candidates) from the treatment and reporting of permissible, legal contributions from those sources when made to SuperPACs[2].

Nor has the Commission provided any guidance to the regulated community with regard to some specialized reporting requirements of contributions to SuperPACs from LLCs, corporations and/or partnerships. In fact, the *only* guidance from the FEC regarding contributions from LLCs is the wholly inapplicable material contained in the Commission's current publications for candidates, corporations and labor organizations and party committees, none of which make sense for or even *mention* SuperPACs, since the underlying principle and directives in all of those publications are that corporate contributions are illegal and certain LLC contributions are also illegal.

See Campaign Guide for Congressional Candidates and Committees (June 2014), Chapter 4, Section 9 "Contributions from Partnerships" and Section 10 "Contributions from Limited Liability Companies". http://www.fec.gov/pdf/candgui.pdf;

Campaign Guide for Corporations and Labor Organizations (January 2007), Appendix E: "Contributions from Partnerships and LLCs"
http://www.fec.gov/pdf/colagui.pdf#search=Contributions%20from%20LLCs

Campaign Guide for Non-connected Committee (May 2008) Chapter 4, "Prohibited Contributions" pp. 18-19, and Appendix C: "Partnership Contributions"
http://www.fec.gov/pdf/nongui.pdf

[1] See 11 C.F.R. §§110.1(e) and (g); 11 C.F.R. §114.2(b). These regulations are each premised upon the prohibition against corporate contributions to political committees, which is inaccurate when applied to IE Only committees.

[2] In October 2014, the Commission issued final rules that implemented a portion of the *Citizens United* decision. Those regulations are wholly silent on the subject of LLC and corporate contributions to Independent Expenditures Only committees. Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, Fed. Reg. Vol. 79, No. 203, October 21, 2014

Campaign Guide for Political Party Committees (August 2013), Chapter 2 "Prohibited Contributions" and Appendix C, "Partnership Contributions". http://www.fec.gov/pdf/partygui.pdf

Even in the Notice to All Campaign Guide Users (October 2011), *http://www.fec.gov/law/recentdevelopments.shtml#IECommittees*, in the section on 'updates' related to SuperPACs, there is no guidance or information which relates to reporting of LLC, corporate and partnership contributions to SuperPACs in any specialized way regarding "underlying sources".

What is clear is that the Commission's regulations that form the basis of the Complaint are inapplicable to contributions to SuperPACs and further that the Commission has offered no guidance or notice as to when these legal contributions may not be permissible.

It is completely arbitrary and capricious for the Commission to prosecute *some* donors who make legally permissible contributions to SuperPACs drawn from LLC, corporate or partnership accounts, but not others.

As former FEC Chairman Bradley Smith wrote earlier this month, the Commission has applied a strict rule for decades that any contribution from a corporate bank account is treated as a contribution from the corporation, even where the funds were actually from an individual. LLC contributions have been analyzed and treated under the FEC regulations from the perspective of whether the LLC is taxed as a corporation, to ensure that corporate contributions in all forms are prohibited.

According to Chairman Smith:

> "Historically, treating LLC donations as corporate donations has worked in favor of "strict" enforcement of straw donor prohibition rules. By keeping the corporation and the individual separate, the Commission could easily identify violations of the rules prohibiting contributions in the name of another. For example, in *United States v. Danielczyk*, 683 F.3d 611, 614 (4th Cir. 2012) cert denied, 133 S. Ct. 1459 (2013), a corporation reimbursed employees who gave to then-Senator Hillary Clinton's 2008 campaign. But because the money was really coming from the LLC, not the individual "contributors," and because corporations are barred from contributing to candidates, the violation was clear. In this case, FEC rules regarding LLCs prevented illegal corporate donations. While this is the opposite result from the current debate (whether LLCs can make legal corporate donations to super PACs), it was more than reasonable to believe that the FEC's rules regarding how to treat these groups would remain constant, regardless of result". *See* "LLCs and Politics at the FEC" by Bradley Smith, April 12, 2016, Center for Competitive Politics. http://www.campaignfreedom.org/2016/04/12/llcs-and-politics-at-the-fec/

The Complaint attempts to shoehorn regulations governing *illegal* corporate and LLC contributions into a violation for completely *legal* corporate and LLC contributions to SuperPACs. It is an absurd application of the law and cannot possibly be the basis for a finding of reason to believe that a violation has occurred in this instance.

First Amendment jurisprudence requires clear notice to the citizens as to what activity is permissible and what is impermissible in the campaign finance context. "...contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo,* 424 U.S. 1, 14 (1976).

The Complaint argues that cases that involve circumvention of the law regarding illegal contributions should be applied to the perfectly legal contribution from Décor Services to America Leads, which was made permissible by the Supreme Court of the United States in *Citizens United* and the DC Circuit Court of Appeals in the *SpeechNow.org* case.

There is not a single statute, FEC regulation, court decision or other legal authority to support the Complaint's thesis that a *legal* contribution is rendered *illegal* because of the date on which the donor entity was formed.

If the FEC decides to promulgate a regulation that requires a business entity to be in existence for a certain period of time before it is eligible to contribute to a SuperPAC, the Commission should undertake such a rulemaking, subject to all the notice and hearing provisions of the formal rulemaking process -- and subject as well to the likely legal challenges to the constitutionality of such a regulation.

Here, there is no legal authority *whatsoever* that stands for the proposition the Complainants seek to impose via their complaint. *See Statement of Reasons of Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman, April 1, 2016 in MURs 6485, 6487, 6488, 6711 and 6930.* http://eqs.fec.gov/eqsdocsMUR/16044391107.pdf;

See also Supplemental Statement of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E.Goodman, MURs 6485, 6487 & 6488, 6711, and 6930. ("...since practically its establishment, the Commission has held that any contribution from a corporate entity's account is *per se* a contribution by that entity, rather than anyone associated with that entity. In our statement, we explained that the Commission's historically rigid treatment of contributions from corporate accounts must be modified to account for the new legal landscape under *Citizens United.") http://eqs.fec.gov/eqsdocsMUR/16044393039.pdf*

There is *nothing* in the FEC's regulatory framework to provide notice to any LLC, corporation, or other business entity of particular rules, pitfalls, or illegal conduct insofar as making contributions from a bank account of such an entity to a SuperPAC. Duly enacted statutes and regulations must meet standards of clear discernibility in order not to be void under vagueness principles. A statute can be impermissibly vague for either of two independent reasons. "First, it fails to provide people of ordinary intelligence a reasonable opportunity to understand what it prohibits. Second, if it authorizes or even encourages arbitrary and

discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (Prosecution under a loitering ordinance held invalid).

A person of 'ordinary intelligence' would be hard pressed to understand why some contributions to SuperPACs from corporations and LLCs are permissible and others are not, when the Commission has failed to promulgate rules, regulations or guidance on the subject.

An enforcement action against Décor Services is completely arbitrary and capricious, and is based merely on the whims of the Complainants who have targeted Décor Services but not others on a purely subjective basis they have concocted, but which exists nowhere in the law.

Such a regulation would likely be constitutionally deficient in any event should the Commission undertake such a rulemaking. Contributions to independent expenditure organizations such as America Leads are protected First Amendment activity. "...constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents," Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion). See Cousins v. [424 U.S. 1, 23] Wigoda, 419 U.S., at 487-488; NAACP v. Button, 371 U.S. 415, 431 (1963)." *Buckley v Valeo,* 424 U.S. 1, 22-23.

The legal authorities on which the Complainants rely are inapplicable to the facts of this case and the Complaint must be dismissed.

B. *There are no facts or legal authorities to support a conclusion that Décor Services is a 'political committee'.*

The Complaint's desperate claim that Décor Services is a 'political committee' is preposterous. Again, there is no legal authority supporting such a proposition. The primary case on which the Complaint relies for its novel theory is *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986) (*"MCFL"*). As noted even by the Complainants, *MCFL* involved a not-for-profit social welfare tax exempt organization established pursuant to 26 I.R.C. §501(c)(4). One of the key arguments in the case was whether *MCFL* was subject to the same prohibitions on corporation contributions and expenditures as a *for profit* corporation. As the Court noted:

> "MCFL does not accept contributions from business corporations or unions. Its resources come from voluntary donations from "members," and from various fundraising activities such as garage sales, bake sales, dances, raffles, and picnics. The corporation considers its "members" those persons who have either contributed to the organization in the past or indicated support for its activities..." *MCFL,* 479 U.S. 238, 242. "...Because it is incorporated, however, MCFL must establish a "separate segregated fund" if it wishes to engage in any independent spending whatsoever." 479 U.S. 238, 253.

The Court concluded that, contrary to the FEC's assertions, the statute's prohibitions against independent expenditures about candidates by *this* corporation were unconstitutional. "In particular, MCFL has three features essential to our holding that it may not constitutionally be

bound by 441b's restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. 238, 264. (emphasis added)

The differences between Décor Services and *Massachusetts Citizens for Life* could not be more stark. Décor Services is a for profit LLC and there are no assertions in the Complaint disputing that fact. The arguments advanced by Complainants would literally sweep under the government's regulatory apparatus every for profit political consulting firm, polling firm, and every other entity whose primary purpose is to engage in the industry of electing candidates for federal office. Clearly, that is not the intent of the statute and *MCFL* has absolutely no bearing on this case.

Again, the Complaint is based on no legal authority whatsoever and the Complainants' feeble attempts to rely upon *MCFL* as some sort of precedent governing these facts is laughable.

Conclusion

The law and the facts demonstrate that there is no basis for a finding of reason to believe that a violation has occurred. And that is, quite simply, because no violation has occurred.

Accordingly, the Complaint should and must be dismissed.

Respectfully submitted,

Cleta Mitchell, Esq.
Counsel for Décor Services, LLC

Date: May 20, 2016